No. 78.

Brf. of Maxwell for Appellee

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Supreme Court

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OF THE

United States.

DEVER PICKENS, Appellant,

versus

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Brief for Appellee, Susan C. Dent Roy,

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The statement of facts and the recital of the pleadings as contained in Appellant's brief upon this appeal are substantially correct, except in respect to the Trustee's answer. The facts in relation to it are as stated in Appellee's answer, and in the answer of the trustee, to which there seem to be no replications in the record.

It is submitted, however, for Appellee that neither the District Court originally, nor the Circuit Court of Appeals, nor,

indeed, this Court, upon this appeal, has any jurisdiction of this proceeding, and it is therefore true, as stated in Appellant's brief (p. 9) that the question here is first one of jurisdiction.

The Circuit Court of Appeals is the Court of last resort in such a proceeding, even assuming what is herein denied, that the District Court had jurisdiction. If the question of the jurisdiction of the District Court in the first instance be in issue, the appeal should be this Court, and not to the Circuit Court of Appeals.

Circuit Court of Appeals, Act March 3, 1891. Sections 5 and 6.

Nothing in the Bankruptcy Act of 1898 confers jurisdiction in such a case upon the District Court. The section defining jurisdiction is section 23, which is as follows:

"*a* The United States Circuit Courts shall have jurisdiction of all controversies at law and equity, as distinguished from proceedings in bankruptcy, between Trustees as such and adverse claimants, concerning the property acquired or claimed by the Trustees, in the same manner and to the same extent only as though the bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

b Suits by the Trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by such Trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

c The United States Circuit Courts shall have concurrent jurisdiction with the Courts of Bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act."

In the opinion delivered by the Circuit Court of Appeals in this cause Judge Goff says:

"Unless the Bankruptcy Act of 1898 specially authorized the Appellant to file his bill in the District Court in connection with the proceedings therein pending relating to his adjudication of bankruptcy, that Court had no authority to entertain it, for it was well determined that the District Courts of the United States

have no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an Act of Congress, such Courts are given authority to hear and decide a particular class of suits. That act gives no such jurisdiction. Nor do we find that said Bankrupt Act gave the bankrupt the right to sue in his own name. His Trustee then represented him, and it was the duty of that officer, under the directions of the Court, to enter his appearance in any pending suit in either a State or Federal Court, and defend the same, or to prosecute, with the approval of the Court, any suit commenced prior to his adjudication. Among the duties imposed by the Act on the Trustee are those of collecting and reducing to money the property of the estate he represents, and in order that he may do so he is vested by the operation of law with the title of the bankrupt, as of the day he was adjudged a bankrupt, in all of his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors. But the Trustee himself could only sue concerning the property of the bankrupt in such Courts as the bankrupt could have sued in had proceedings in bankruptcy not have been instituted. The Appellant's Trustee could not have sued the Defendant's below in the District Court of the United States for the District of West Virginia concerning the property of the bankrupt he represented unless with the consent of said Defendants, and it is, we think, quite clear that the bankrupt had no standing in that Court."

Judge Goff's opinion (this record), pp. 52-3.

Bardes v. Hawardin Bank, 178 U. S., 124.

"If jurisdiction is claimed on account of the subject matter of the suit, and because of the question of equitable cognizance embraced therein, and not auxilliary to the bankrupt proceedings, then the suit should have been instituted in the Circuit Court of the United States, due regard having been had to the citizenship of the parties."

Judge Goff's opinion, p. 53

Besides, an injunction by the Federal Court of a State Court is void under the United States Statutes, and might be disre-

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garded without subjecting the defendant to proceedings for contempt.

Revised Stat. U. S., Sec. 720.

Laidley v Jasper, 49 W. Va., 526.

Huntington v. Laidley, 176 U. S., 668–678

But, conceding jurisdiction to the District Court, it could not in a cause like this, under the spirit of the Bankruptcy Act, and the decisions of this Court thereunder, divest the State Court—the Circuit Court of Barbour county—where the bankrupt resided, and where his property was, of jurisdiction acquired of both as far back as 1889.

Judge Goff's opinion, p. 54

Taylor v. Carry, 20 How., 583.

Eyster v. Gaff, 91 U. S., 521.

Frazier v. South L. and Trust Company, 99 Fed. Rep., 707.

The Circuit Court of Barbour county had not only acquired jurisdiction of Appellant's person and property years before his adjudication of bankruptcy, but in the Chancery Cause, the decree whereof was enjoined in the District Court by Appellant, had under the prayers of the bills therein and the opinion of the State Supreme Court of Appeals, actual custody of his property.

Dent v. Pickens, 46 W. Va., 379.

In that opinion, which was rendered in the fall of 1898, but reheard on motion of Appellant, and handed down unchanged on the 15th day of April, 1899, directions were, under the Statute of the State in such case made and provided, (Code, Ch. 135, Sec. 26) given by said Supreme Court of Appeals to the Circuit Court below, to take charge of certain of Appellant's personal property, and "take such further proceedings as might be necessary to sequester the rents, issues and profits of his real estate."

Under the 29th section of the same Statute this opinion of the Supreme Court became *ipso facto* the decree of the Circuit Court below. That section provides that "the Court from which any case may have come to the Supreme Court of Appeals shall

enter the decision of the appellate Court as its own, and execution thereon may issue accordingly. If such decision be received by the clerk of the Court below in vacation he shall enter it of record in his order book, and thereupon such execution may issue and such proceedings be had in the case as would have been proper if the decision had been entered in Court."

It was not until after the rendition of this opinion and the delay occassioned by Appellant's motion to rehear it, and before the Circuit Court below could (as the record therein shows, by reason of continuances made necessary by the Statute of the state on account of the death of a defendant therein) by the decree enjoined, entered at the February term thereof, 1900, carry into effect the mandate and directions of the said Supreme Court of Appeals, that Appellant conceived, or at least executed, the design of thwarting the State Courts by proceedings in bankruptcy.

It is submitted for Appellee that he was too late. The custody of his property was in the State Courts, if not, in fact, in equity and by operation of law, and actual seizure was not necessary.

High on Receivers, Sec. 4.

Beverly v. Bronke, 4 Gratt., 187.

Kimberley v. Hartley (S. C.,) 1 Fed., 571

Taylor v. Carryl, 20 How., 583 (*Supra*).

Carrell v. Heyman, 111 U. S., 82.

It should be remembered, too, that the suit against Appellant in the State Court was a proceeding which prevailed and falls within the following Statute (Code, Ch. 133, Sec. 2):

"A creditor before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

Under this Statute it has repeatedly been held by the Supreme Court of Appeals of West Virginia that a lien was credited

from the date of the institution of such suit.

Sweeny v. Refining Co., 30 W. Va., 448.

Clark v. Figgins, 31 Ib., 155

Guggenheimer v. Lockbridge, 39 Ib., 457.

And resort need not be had for satisfaction in the first instance to execution upon personal property, but may be had at once against the property assailed as fraudulently conveyed.

Hoffman v. Fleming, 43 W. Va., 762.

It is submitted that the Trustee of Appellant was but a *pendent lite* transferee of the title to Appellant's effects, whether real or personal, and was bound, like a person purchasing pending a controversy, to respond to any decree that might be properly entered therein.

"The obvious reason for this is," as Justice Miller said in Eyster v. Gaff, *supra*, "that if, when the jurisdiction of the Court once attached, it could be ousted by the transfer of the Defendant's interest, there would be no end to the litigation and justice would be defeated by the numbers of these transfers."

Again, in the same case, Justice Miller also says: "The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared a bankrupt the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any Court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other Courts can proceed no further in suits of which they had at that time full cognizance of, and it was prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the Bankrupt Court by the service of a rule to show cause, and to dispose of their rights in a summary way. This Court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of these rights by the bankruptcy of his adversary. The same Courts remain open to him in such contests, and the Statute has not divested these courts of jurisdiction in such actions. It has for certain

classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit Court and District Courts of the United States. It is concurrent with, and does not divest that of those Courts.

Appellee disputes the position of Appellant's brief herein, that Appellee consented to the jurisdiction of the District Court by proving her claim in bankruptcy. This point is decided against Appellant by the opinion of the Circuit Court of Appeals herein (p. 54).

It has also been held that a claim having priority must be proved in bankruptcy proceedings, whether to be enforced in that Court or not.

In re Falls City Shirt Mfg. Co., 98 Fed. Rep., 592.

Vol 16, (2d Ed.,) Am. and Eng. Ency. Law, p. 688.

In conclusion it is submitted that it would be almost the equivalent of a denial of justice to permit the District Court, which has but concurrent, if any, jurisdiction in this cause, to practically nullify this prolonged litigation in the State Courts. All the rights which Appellant claimed or might have claimed were involved in these Courts, and have been adjudicated against him by the decree enjoined. Why should he be permitted to litigate them over again in the Bankrupt Court? A matter once in issue, or which under the pleadings might have been put in issue, is determined by the final decree.

McCoy v. McCoy's Adm'r., 29 W. Va. 791.

Appellee here refers to the record in the chancery cause pending in the State Court, which by stipulation of counsel in the record (p. 49) is made part thereof, and insists that this appeal should be dismissed, or the decree of the Circuit Court of Appeals herein affirmed, with costs.

EDWIN MAXWELL,
J. HOP. WOODS,
Counsel for Appellee.

Clarksburg, W. Va. Nov. 18, 1902.